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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 DEBORAH MCQUEEN,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL,
Acting Commissioner of Social Security,

12 Defendant.

Case No. 3:17-cv-05632-BAT

**ORDER AFFIRMING AND
DISMISSING WITH PREJUDICE**

13 Deborah McQueen appeals the decision of the Administrative Law Judge (ALJ) finding
14 her not disabled. She contends the ALJ erroneously 1) rejected portions of the opinion of Bryan
15 G. Marchant, M.D.; and 2) did not provide legally sufficient reasons for finding that her
16 subjective allegations were inconsistent with the record. Dkt. 12 at 1. As discussed below, the
17 ALJ did not err and her decision is supported by substantial evidence. Accordingly, the Court
18 **AFFIRMS** the decision and **DISMISSES** the case with prejudice.

19 **BACKGROUND**

20 Ms. McQueen filed her third application for a period of disability and disability insurance
21 benefits under Title II of the Social Security Act (the Act), 42 U.S.C. §§ 403-33, on October 26,
22 2012. Tr. 1040. Ms. McQueen alleges disability due to cervical sprain, bilateral rotator cuff
23 tears, chronic pain, depression, and diabetes. Tr. 18, 349. Ms. McQueen claims she has been

1 disabled since August 6, 2010. However, the earliest date that could be considered is October 4,
2 2011, the day after the last determination became administratively final on October 3, 2011. Tr.
3 363, 1040. Her disability insurance expired on September 30, 2013, the date last insured (DLI).
4 Tr. 1040, 1043. Thus, Ms. McQueen had to show that she was unable to work between October
5 4, 2011 and September 30, 2013. 20 C.F.R. § 404.1509.

6 The Court previously remanded this case for further proceedings in July 2016, under case
7 number 3:15-cv-05893-JRC. In that case, the ALJ was directed to discuss the examining
8 physician opinion of Dr. Marchant; reassess the evidence and opinion of treating physician Dr.
9 Naiman; reevaluate the RFC; reassess Ms. McQueen's subjective allegations; and, hold a remand
10 hearing. Tr. 1121-33. The ALJ held a new hearing on November 28, 2016 (Tr. 1060-87) and
11 issued a decision on June 5, 2017, finding Ms. McQueen was not disabled from October 4, 2011
12 through September 30, 2013. Tr. 1040-53.

13 Utilizing the five-step disability evaluation process,¹ the ALJ previously found at steps
14 one through three that Ms. McQueen last worked on September 30, 2013 and that Ms. McQueen
15 had the following severe impairments: degenerative disc disease; degenerative joint disease;
16 status post rotator cuff repair, left side; diabetes mellitus; hypertension; obesity; and depression.
17 The ALJ also found that these impairments did not meet the Listings.² Tr. 20-23. These findings
18 were not disturbed on appeal and were not revisited on remand.

19 At step five on remand, the ALJ found that through the DLI, Ms. McQueen had the RFC
20 to perform light work as defined in 20 CFR 404.1567(b) including the ability to do the following.
21 She can never push or pull overhead. She can occasionally climb, stoop, kneel, crouch and
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23 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 crawl. She can occasionally reach overhead. She can perform work in which concentrated
2 exposure to extreme cold, heat, vibration, fumes, odors, dusts, gases, poor ventilation and/or
3 hazards is not present. In order to meet ordinary and reasonable employer expectations
4 regarding attendance, work place behavior and production, she can understand, remember and
5 carry out unskilled, routine, and repetitive work that can be learned by demonstration, and in
6 which the tasks to be performed are predetermined by the employer. She can cope with
7 occasional work setting change and occasional interaction with supervisors. She can work in
8 proximity to coworkers, but not in a team or cooperative effort. She can perform work that does
9 not require interaction with the general public as an essential element of the job, but occasional,
10 incidental contact with the general public is not precluded. Tr. 1045.

11 With this RFC, the ALJ found at step four that Ms. McQueen was unable to perform past
12 relevant work as a home attendant. Tr. 26 (this finding was not disturbed on appeal). At step
13 five, the ALJ called a vocational expert (VE), who testified that Ms. McQueen could work as a
14 housekeeper, a small products assembler, or a price marker. Tr. 1053.

15 DISCUSSION

16 A. The ALJ's Assessment of Dr. Marchant's Opinion

17 On March 6, 2010, independent medical examiner and orthopedic surgeon Bryant
18 Marchant, M.D., observed that Ms. McQueen had decreased range of motion in the cervical
19 spine, diffuse tenderness to palpation in myofascial regions from the cervical spine to her
20 trapezius along her rhomboids and into her shoulder bilaterally, decreased bilateral forward
21 flexion and rotation, 4+/5 internal rotation strength in the left shoulder, significant diffuse
22 tenderness to palpation over joint of the shoulders bilaterally, and pain with ranges of motion. Tr.
23 709-10. Dr. Marchant also found Ms. McQueen could lift and carry up to five pounds

1 frequently, up to 10 pounds occasionally, and seldom lift and carry up to 25 pounds; sit four
2 hours total; stand two hours total; walk two hours total; occasionally bend and squat; seldom
3 kneel, crawl, climb; and never reach above shoulder level. Tr. 743.

4 With regard to the ALJ's assessment of Dr. Marchant's opinion, this Court previously
5 held:

6 The ALJ's residual functional capacity ("RFC") conflicts with the opinion
7 from Dr. Marchant in a number of ways, including the ALJ's finding that plaintiff
8 could stand and walk for about six hours and sit for about six hours, and also that
9 she occasionally could reach overhead with both upper extremities (see AR. 23).
As noted, Dr. Marchant opined that plaintiff never could reach above shoulder
level (AR. 743). Tr. 1131.

10 After the remand hearing, the ALJ specifically addressed Dr. Marchant's opinion. The
11 ALJ's treatment of that opinion, in its entirety, is as follows:

12 Significant weight is assigned to the portion of the independent medical
13 examiner (IME) opinion from Dr. Marchant dated March 2010 that the claimant
14 cannot have exposure to workplace hazards such as unprotected heights, as this is
15 consistent with the evidence. (8F/18). While Dr. Marchant opines that the
16 claimant is able to use her hands for repetitive tasks such as pushing/pulling, I
17 find that she can never push/pull overhead. As discussed at length in this Finding,
18 Dr. Naiman has treated the claimant for years, and particularly for impairment(s)
19 with the bilateral upper extremities. As Dr. Naiman's records show gradual
20 improvement in her impairments from 2010 through 2013 however, I find that
21 claimant can occasionally reach overhead. As stated, in July 2013, Dr. Naiman
22 commented that aside from being obese, the claimant, "appears generally
23 healthy." (17F/2). Little weight is given to the portion of Dr. Marchant's opinion
that the claimant can sit for a total of 4 hours, as well as stand/walk for 2 hours in
an 8 hour day, for in May 2013, the claimant had normal strength in the bilateral
lower extremities. (15F/6). She was also able to heel and toe walk. Additionally,
Dr. Naiman advised the claimant to start riding an exercise bicycle every other
day for 15 minutes at a time. (10F/11). I further find that the claimant should
avoid concentrated exposure to respiratory irritants, which Dr. Marchant did not
recommend. Common-sense suggests that with several severe physical
impairments the claimant will have an easier time working in an environment
without respiratory irritants, in that it will place less stress on her system overall.

Tr. 1050. Ms. McQueen argues the ALJ committed harmful legal error by failing to "adhere to
the law of the case when again rejecting a portion of Dr. Marchant's opinion without

1 explanation.” Dkt. 12 at 9. She argues the ALJ failed to provide a valid explanation for
2 rejecting Dr. Marchant’s finding that Ms. McQueen could sit for only four hours, stand for only
3 two hours, and walk for only two hours; and that she could “lift and carry up to five pounds
4 frequently, up to 10 pounds occasionally, and seldom lift and carry up to 25 pounds.” *Id.* (citing
5 Tr. 743).

6 At the outset, the Court notes the law of the case doctrine, which provides that a decision
7 of a higher court on a legal issue must be followed in all subsequent proceedings in the same
8 case, does not apply here. This case was remanded for further proceedings for the ALJ to
9 consider and discuss evidence, which the ALJ had not previously discussed and on which the
10 Court had not previously ruled. Additionally, the Court notes the ALJ posed more than a “single
11 reason” to reject portions of Dr. Marchant’s opinion.

12 To reject an uncontradicted opinion of a treating or examining doctor, an ALJ must state
13 clear and convincing reasons that are supported by substantial evidence. *Lester v. Chater*, 81
14 F.3d 821, 830–31 (9th Cir.1995). If a treating or examining doctor’s opinion is contradicted by
15 another doctor’s opinion, an ALJ may only reject it by providing specific and legitimate reasons
16 that are supported by substantial evidence. *Id.* Here, the ALJ gave specific and legitimate
17 reasons for rejecting portions of Dr. Marchant’s opinion.

18 The ALJ properly noted that Theodore S. Naiman II, M.D., who had been treating Ms.
19 McQueen for years, reported “gradual improvement in [Ms. McQueen’s] impairments from 2010
20 through 2013.” In July 2013, Dr. Naiman stated that, aside from being obese, Ms. McQueen
21 “appears generally healthy.” Tr. 1050. The ALJ also noted that in May 2012, Dr. Naiman was
22 of the opinion that Ms. McQueen was not in any acute distress and had recommended that she
23 start riding an exercise bicycle every other day for 15 minutes at a time. Tr. 1050, 773. The ALJ

1 concluded that “[c]ommon sense suggests that if the claimant were in fact disabled, [Dr. Naiman]
2 would not have recommended that she become more active and exercise.” Tr. 1049 (citing Tr.
3 773).

4 Also, in May 2013, Dr. Naiman examined Ms. McQueen’s lower extremities. At that
5 time, Ms. McQueen sought treatment after she fell in her yard while picking up rocks. Although
6 she claimed that she was suffering a 10/10 pain level in her lower back and weakness in her legs,
7 Dr. Naiman’s examination revealed that she had normal strength in her legs, was able to heel and
8 toe walk, had intact sensation in both extremities, and that she had suffered no infractions. Tr.
9 1050 (citing Tr. 932-933, 940).

10 It was not error for the ALJ to give greater weight to the opinion of Ms. McQueen’s
11 treating physician. *See Carmickle v. Commissioner*, 533 F.3d 1155, 1164 (9th Cir. 2008)
12 (“Those physicians with the most significant clinical relationship with the claimant are generally
13 entitled to more weight than those physicians with lesser relationships.”). In addition, “[w]here
14 there is conflicting medical evidence, the [Commissioner] must determine credibility and resolve
15 the conflict.” *Thomas v. Barnhart*, 278 F.3d 947, 956-957 (9th Cir. 2002) (quoting *Matney v.*
16 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). The ALJ found that Dr. Naiman’s treatment
17 records showed gradual improvement in Ms. McQueen’s impairments and, as such, little weight
18 was given to Dr. Marchant’s sit, stand, and walk limitations. This was not unreasonable. This
19 was also consistent with treatment notes in February 2011 documenting that Ms. McQueen was
20 “very happy and pleased” when she engaged in more physical activity. Tr. 1048 citing Tr. 449.

21 Ms. McQueen also contends the ALJ erred when she ignored Dr. Marchant’s opinion
22 about weight limits. Dkt. 12 at 10. However, the ALJ incorporated by reference those portions
23 of her prior decision that were not disturbed by the District Court. Tr. 1047 referencing Tr.

1 1088-1101. Specifically, the ALJ noted that in March 2013, Hayden Hamilton, M.D., observed
2 that Ms. McQueen's gait was unremarkable and she had good heel strike and push off in both
3 feet. Tr. 917. Dr. Hamilton found generally normal ranges of motion, as well as normal motor
4 strength in the upper and lower extremities bilaterally. Tr. 918. Testing also showed that she
5 could pick up small objects off a hard surface without difficulty and light touch was intact in all
6 of her extremities, although pinprick was decreased in the right upper extremity. Tr. 918. Dr.
7 Hamilton opined Ms. McQueen was unlimited in her ability to sit, stand and walk in an 8-hour
8 workday, was capable of lifting or carrying 50 pounds occasionally and 25 pounds frequently,
9 could climb ladders and scaffolding frequently, and had no manipulative limitations. Tr. 919.
10 The ALJ gave some weight to Dr. Hamilton's opinion, but she found the entire record showed
11 Ms. McQueen was limited to a light level of exertion instead of medium exertion. Tr. 1099. Dr.
12 Hamilton's opinion of Ms. McQueen's lifting ability contradicted Dr. Marchant's opinion.
13 However, it was not error for the ALJ to give more weight to Dr. Hamilton's opinion. Medical
14 reports that are more recent "are highly probative." *Osenbrock v Apfel*, 240 F.3d 1157, 1165 (9th
15 Cir. 2000).

16 Also, in incorporating by reference her prior decision, the ALJ gave great weight to the
17 opinion of the State Agency reviewing consultant, Dennis Koukol, M.D., who in June 2013,
18 assessed Ms. McQueen capable of light level work with occasional overhead reaching bilaterally.
19 Tr. 1098 citing Tr. 107-10. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)
20 (A non-examining physician's opinion may amount to substantial evidence as long as other
21 evidence in the record supports those findings.) The ALJ also discussed the August 2010
22 treatment record of Antoine D. Jones, M.D. Tr. 1048, 467-70. After his examination of Ms.
23 McQueen, Dr. Jones concluded that she had normal strength in both arms with normal and

1 symmetrical reflexes; she had “no focal muscle atrophy” in her upper extremities; her pain was
2 “most likely secondary to her bilateral shoulders” and was “likely bursitis;” and he
3 recommended that she get into a work conditioning program because “disuse” of her shoulders
4 was starting “a burgeoning adhesive capsulitis.” Tr. 1048 citing Tr. 468-469 (“studies show that
5 the longer a patient stays off from work, the less likely they will return successfully to work.”).

6 Because the ALJ gave legitimate reasons to discount the opinion of Dr. Marchant, the
7 Court affirms the ALJ’s opinion.

8 **B. The ALJ’s Assessment of Ms. McQueen’s Credibility**

9 During the November 28, 2016 remand hearing, Ms. McQueen testified that worsening
10 back pain with accompanying reduced functionality is her most severe impairment. She testified
11 that she experiences shooting pains from the left side of her hip bone and thigh down through the
12 center of her left foot; that she also has lower back pain and needs to change positions, *i.e.*, stand
13 up or sit down because of the pain; she frequently lays down throughout the day to ease back
14 pain; she frequently drops dishes and cups and is unable to open jars; she showers less frequently
15 as it is difficult to get in and out of the bathtub; and, she frequently has difficulty reaching
16 overhead with both upper extremities although she had left shoulder surgery in 2008 and
17 declined to have corrective surgery on her right shoulder. Mr. McQueen testified that her right
18 shoulder goes numb when she lays down on it and constantly uses a tong or claw-object to grab
19 onto things. Ms. McQueen testified that she is depressed because of constant, severe pain and
20 reduced functionality and she is forgetful due to the combination of pain and depression, and
21 needs to make lists for the store. Tr. 1046.

22 The ALJ found Ms. McQueen’s medically determinable impairments could reasonably be
23 expected to cause the alleged symptoms, but found that her statements concerning the intensity,

1 persistence and limiting effects of these symptoms were not entirely consistent with the medical
2 evidence and other evidence in the record. Tr. 1046-47.

3 An ALJ's assessment of a claimant's credibility is entitled to "great weight." *Anderson v.*
4 *Sullivan*, 914 F.2d 1121, 1124 (9th Cir. 1990); *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir.
5 1985). The Ninth Circuit has repeatedly and consistently held that where the record includes
6 objective medical evidence establishing that the claimant suffers from an impairment that could
7 reasonably produce the symptoms of which he complains, an adverse credibility finding must be
8 based on "clear and convincing reasons." *Carmickle*, 533 F.3d at 1160 (citations omitted); *see*
9 *also Brown-Hunter v. Colvin*, 806 F.3d 487, 488-89 (9th Cir. 2015); *see* Social Security Ruling
10 96-7p (explaining how to assess a claimant's credibility), *superseded*, Social Security Ruling
11 16-3p (eff. March 28, 2016).³

12 At the same time, the ALJ is not "required to believe every allegation of disabling pain,
13 or else disability benefits would be available for the asking, a result plainly contrary to 42 U.S.C.
14 § 423(d)(5)(A)." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.1989). In evaluating the claimant's
15 testimony, the ALJ may use "ordinary techniques of credibility evaluation." *Turner v.*
16 *Commissioner of Social Sec.*, 613 F.3d 1217, 1224 n. 3 (9th Cir. 2010) (quoting *Smolen v.*
17 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)). For instance, the ALJ may consider inconsistencies
18 either in the claimant's testimony or between the testimony and the claimant's conduct, *id.*;

20 ³ Social Security Rulings ("SSRs") are binding on the Administration. *See Terry v. Sullivan*, 903
21 F.2d 1273, 1275 n.1 (9th Cir. 1990). The appropriate analysis in the present case would be
22 substantially the same under either SSR 96-7p or SSR 16-3p. *See R.P. v. Colvin*, 2016 WL
23 7042259, at *9 n.7 (E.D. Cal. Dec. 5, 2016) (observing that only the Seventh Circuit has issued a
published decision applying Ruling 16-3p retroactively; also stating that Ruling 16-3p
"implemented a change in diction rather than substance") (citations omitted); *see also Trevizo v.*
Berryhill, 2017 WL 4053751, at *9 n.5 (9th Cir. Sept. 14, 2017) (SSR 16-3p "makes clear what
our precedent already required.")

1 “unexplained or inadequately explained failure to seek treatment or to follow a prescribed
2 course of treatment,” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting
3 *Smolen*, 80 F.3d at 1284); and “whether the claimant engages in daily activities inconsistent with
4 the alleged symptoms,” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040 (9th Cir. 2007). While a
5 claimant need not “vegetate in a dark room” to be eligible for benefits, *Cooper v. Bowen*, 815
6 F.2d 557, 561 (9th Cir.1987) (quoting *Smith v. Califano*, 637 F.2d 968, 971 (3d Cir.1981)), the
7 ALJ may discredit a claimant’s testimony when the claimant reports participation in everyday
8 activities indicating capacities that are transferable to a work setting, *see Morgan v. Comm’r Soc.*
9 *Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.1999); *Fair*, 885 F.2d at 603. Even where those
10 activities suggest some difficulty functioning, they may be grounds for discrediting the
11 claimant’s testimony to the extent that they contradict claims of a totally debilitating impairment.
12 *See Turner*, 613 F.3d at 1225; *Valentine v. Commissioner of Social Sec. Admin.*, 574 F.3d 685,
13 693 (9th Cir. 2009).

14 As discussed below, the ALJ stated sufficient reasons for deeming Ms. McQueen’s
15 subjective complaints less than fully credible.

16 The ALJ noted that records submitted after the decision issued in April 2014 (which was
17 six months after Ms. McQueen’s DLI), showed improvement. Tr. 1047 citing Tr. 1254 (“She is
18 ambulating normally. She has some tenderness in the low lumbar area and decreased range of
19 motion of the lumbar area due to pain. Normal strength and sensation in the lower
20 extremities.”). In September 2016, it was noted that she was not in acute distress although she
21 complained of sciatic pain. Tr. 1272. “[M]edical evaluations made after the expiration of a
22 claimant’s insured status are relevant to an evaluation of the pre-expiration condition.” *Smith v.*
23 *Bowen*, 849 F.2d 1222, 1225 (9th Cir.1988).

1 The ALJ also incorporated by reference her previous analysis of Ms. McQueen's physical
2 and mental impairments, which included a discussion of credibility. Tr. 1047, 1049 (citing Tr.
3 1093-94, 1097-98). At that time, the ALJ found McQueen's allegations were not consistent with
4 the objective medical evidence. Tr. 1097-98. 20 C.F.R. § 404.1529(c)((2) (objective medical
5 evidence is a useful indicator in making reasonable conclusions about the intensity and
6 persistence of symptoms). For example in August 2010, Ms. McQueen had normal strength in
7 both upper extremities, normal and symmetrical reflexes and intact sensation in her upper
8 extremities; her rotator cuff muscles were intact; and she had no focal muscle atrophy in her
9 upper extremities. Tr. 835. Dr. Jones recommended a work conditioning program and, in
10 commenting on the fact that she had been out of work for at least a year, noted that studies
11 showed "the longer a patient stays off from work, the less likely they will return successfully to
12 work." Tr. 836, 1048. Dr. Hamilton found Ms. McQueen had normal gait, normal ranges of
13 motion (other than motion in her shoulders due to bursitis), and normal motor strength in her
14 upper and lower extremities. Tr. 1097, 918-19. Ms. McQueen felt good about increasing her
15 physical activity level. Tr. 1097, 449. Dr. Naiman encouraged Ms. McQueen to become more
16 rather than less active, and to improve her diet and exercise and lose weight. Tr. 1049, 799, 441.
17 In August 2011, Dr. Naiman stated Ms. McQueen "really wants a disability rating at this point."
18 Tr. 1049, 789. The ALJ concluded that when compared to the objective findings, this suggested
19 that Ms. McQueen had a degree of disability conviction despite evidence to the contrary. Tr.
20 1049. In addition, although Ms. McQueen complained of depression, she did not want to take
21 antidepressant medication. Tr. 1049, 785.

22 Dr. Naiman advised Ms. McQueen that compliance with treatment included not only
23 taking medication, but also better managing her diet, exercising and losing weight. Dr. Naiman

1 noted that Ms. McQueen functioned well enough to perform daily activities and household
2 chores when she was compliant with treatment. Tr. 1049, 782. There was also some evidence
3 showing that Ms. McQueen was more active than she let on. *See* Tr. 932 (in May 2013 she
4 sought treatment due to a fall that occurred while she was outside doing yardwork “picking up
5 rocks” two days earlier).

6 The Court finds that these were legally sufficient reasons on which the ALJ could
7 properly rely to support an adverse credibility determination because an ALJ may base an
8 adverse credibility determination on evidence of improvement or fair response from treatment.
9 The Court therefore defers to the ALJ’s credibility determination. *See Lasich v. Astrue*, 252
10 Fed.Appx. 823, 825 (9th Cir. 2007) (court will defer to Administration’s credibility
11 determination when the proper process is used and proper reasons for the decision are provided);
12 *accord Flaten v. Secretary of Health & Human Services*, 44 F.3d 1453, 1464 (9th Cir. 1995).

13 CONCLUSION

14 For the foregoing reasons, the Court **AFFIRMS** the Commissioner’s final decision and
15 **DISMISSES** this case with prejudice.

16 DATED this 27th day of February, 2018.

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18 BRIAN A. TSUCHIDA
19 United States Magistrate Judge
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